

Provisional text

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 14 January 2021 (1)

Case C-4/20

‘ALTI’ OOD

v

Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ Plovdiv pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

(Request for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria))

(Request for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 205 and Article 273 – Joint and several liability of a third party who is not the person liable for payment of VAT – Extent of liability – Extension of secondary liability to default interest owed by the person liable for payment of VAT – Extended liability with a view to the effective combatting of VAT fraud – Existence of VAT fraud in the case of non-payment of the declared VAT liability)

I. Introduction

1. The Court is once again being called upon to interpret the VAT Directive – in the case at issue Articles 205 and 273 – by striking a balance between the effective collection of VAT by Member States and the fundamental rights of the persons concerned in conjunction with the principle of proportionality.

2. On this occasion it must be clarified whether the VAT Directive permits a Member State to provide that, in addition to the supplier, the recipient of a purely domestic supply is a further ‘person liable for payment of VAT’ (or, more precisely, a ‘person with secondary liability’) and to hold him liable not only for a third-party VAT liability but also for third-party default interest. Article 205 of the VAT Directive provides that, in certain situations, Member States may provide that another person in addition to the person liable for payment of VAT is to be held liable for payment of VAT, but does not contain any further statements regarding the extent of that liability.

3. On the other hand, consideration must be given to the Member States’ procedural autonomy, which might also permit liability for third-party default interest to be introduced as a kind of penalty, irrespective of Article 205 of the VAT Directive. Bulgaria considers liability for default

interest to be necessary in the light of the objective of the effective combatting of fraud. In the present case it is unclear whether the recipient knew or should have known that the supplier paid by it duly declared its VAT liability, but did not discharge it in good time.

II. Legal framework

A. EU law

4. The framework in EU law is provided by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (2) ('the VAT Directive').

5. Recital 44 of that directive states:

'Member States should be able to provide that someone other than the person liable for payment of VAT is to be held jointly and severally liable for its payment.'

6. Article 193 of the VAT Directive provides as follows with regard to persons liable for payment of VAT:

'VAT shall be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199 and Article 202.'

7. Article 205 of the VAT Directive includes the possibility of providing for a further person, in addition to the person liable for payment of VAT, to be held jointly and severally liable for payment of VAT:

'In the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.'

8. The second paragraph of Article 207 of the VAT Directive further provides:

'Member States shall also take the measures necessary to ensure that those persons who, in accordance with Article 205, are held to be jointly and severally liable for payment of the VAT comply with these payment obligations.'

9. The first paragraph of Article 273 of the VAT Directive envisages possibilities available to Member States *inter alia* for countering evasion:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

B. Bulgarian law

10. Bulgarian law provides, in Article 177 of the Zakon za danak varhu dobavenata stoynost (Law on value added tax, ZDDS), that a third party may be held liable in the case of VAT fraud. Under that provision, an undertaking which has received a taxable supply and exercised the right of input tax deduction in respect of it is liable for unpaid VAT owed by its supplier if it knew or should have known that the VAT corresponding to the input tax deduction would not be paid by the supplier.

11. Under Article 14(3) and Article 16(3) of the Danachno-osiguriteln protsesualen kodeks (Tax and Insurance Procedure Code, DOPK), the secondary liability of a third party in tax law includes interest and collection costs.

12. Articles 121, 122 and 126 of the Zakon za zadalzheniata i dogovorite (Law on obligations and contracts, ZZD) contain provisions on the merely relative effect of joint and several liability. Under those provisions, the creditor may demand enforcement of the entire debt from the joint and several debtor of his choice. If the default can be attributed to only one of the debtors, the creditor may claim full compensation for damage from that debtor. The other debtors are jointly and severally liable only up to the value of the amount originally owed. Default on the part of a joint and several debtor produces no effects in respect of the other debtors.

III. Main proceedings

13. 'Alti' OOD ('the applicant') is a Bulgarian company with limited liability.

14. On 10 April 2014, the applicant acquired from the Bulgarian single-member company with limited liability 'Fotomag' EOOD ('the supplier') a combine harvester, a tractor and, in May, further agricultural equipment. The supplier issued the applicant invoices in respect of the supplies, showing VAT separately. The applicant transferred the amounts to a bank account of the supplier and exercised the right of input tax deduction.

15. According to an invoice of 10 April 2014, the supplier in turn acquired the agricultural technology mentioned from an undertaking in the United Kingdom, which is why intra-Community acquisitions were made by the supplier in Bulgaria. In a tax audit of the supplier, however, it was found in June 2016 that, while the resulting tax debt had been declared, it had largely not been paid. The supplier was held liable, by a tax assessment notice, for the remaining tax debt together with default interest as from April 2014.

16. A tax audit was also ordered in respect of the applicant. By a tax assessment notice of 23 February 2018 ('the liability notice'), it was held to be jointly and severally liable. Under Article 177 of the ZDDS it was liable for VAT that had been shown by the supplier in the invoices, but had not been paid. In addition to the supplier's tax liability, that liability notice also covered the default interest owed by the supplier as from April 2014.

17. The applicant unsuccessfully raised an objection to the liability notice and then brought an action at the Administrativen sad Plovdiv (Administrative Court, Plovdiv, Bulgaria).

18. The Administrative Court before which the matter was brought dismissed the action. It found that default interest was also to be paid in the context of joint and several liability. This resulted from the fact that the application of Article 16(3) of the DOPK was not excluded and it was expressly established in that provision that the party liable for the liabilities of a taxable person was liable for taxes and statutory social insurance contributions as well as for interest and costs for the charging thereof. Joint and several liability under Article 177(1) of the ZDDS was not limited to the amount of the 'owed and unpaid tax'. The supplier's default also put the applicant in default.

19. The applicant lodged an appeal in cassation against the judgment of the Administrativen sad Plovdiv at the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria). The parties to those proceedings evidently still disagree as to whether the subjective element of Article 177 of the ZDDS, namely that the recipient knew or should have known that the supplier would not pay VAT, is actually satisfied.

20. Irrespective of this, the applicant also asserts that it cannot owe default interest for the period between the supplier's VAT liability becoming due and the liability notice being issued. Because it does not owe any original VAT on the basis of the supply, it has not breached any duty to pay that VAT within the period prescribed by the ZDDS. The liability of the recipient of a taxable supply under Article 177 of the ZDDS does not include default interest arising in respect of the supplier from the date of the supply.

IV. Request for a preliminary ruling and procedure before the Court

21. Thereupon, by order of 16 December 2019, the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) made reference to the Court for a preliminary ruling on the following questions:

1. Are Article 205 of the VAT Directive and the principle of proportionality to be interpreted as meaning that the joint and several liability of a registered person, which is the recipient of a taxable supply, for the value added tax not paid by its supplier in addition to the supplier's principal debt (the value added tax debt) also includes the accessory obligation to pay compensation for late payment in the amount of the statutory interest on the principal debt from the beginning of the debtor's default until the issuance of the tax assessment notice by which the joint and several liability is established or until the discharge of the debt?

2. Are Article 205 of the VAT Directive and the principle of proportionality to be interpreted as precluding a national provision such as Article 16(3) of the Danachno-osiguriteln protsesualen kodeks (Tax and Insurance Procedure Code) according to which a third party's liability for unpaid taxes of a taxable person includes the taxes and the interest?

22. In the proceedings before the Court, the Bulgarian tax authorities, the Republic of Bulgaria and the European Commission submitted written observations.

V. Legal assessment

23. By its two questions, the referring court wishes to know whether the liability of a third party (hereinafter referred to as 'the person with secondary liability') allowed by Article 205 of the VAT Directive covers only liability for tax or also includes liability for default interest owed by the person liable for payment of VAT. If the latter is not the case, it would like to know whether Article 205 of the VAT Directive precludes the Bulgarian rule of tax procedure which expands the extent of the liability of a third party in tax law to include default interest owed by the person liable for payment of VAT. As Bulgaria and the Commission have asserted, the two questions can be examined

together.

24. Since the referring court asks in particular about the extent of that liability, I will begin by examining the scope of the possibility provided for in Article 205 of the VAT Directive. It must therefore be clarified whether, in addition to VAT, Article 205 of the VAT Directive also covers other ancillary supplies such as default interest owed by the person liable for payment of VAT and, if that is not the case, whether it then precludes the Bulgarian rule (see A).

25. Bulgaria has prescribed liability in respect of default interest in the case that the person liable for payment of VAT has not paid the tax and the person with secondary liability knew or should have known this. Accordingly, consideration must also be given, with regard to the extent of liability, to Article 273 of the VAT Directive, which permits Member States to impose other obligations to prevent evasion. Liability for default interest can possibly be based on Article 205 in conjunction with Article 273 of the VAT Directive (see B).

A. Extent of the joint and several payment obligation (secondary liability) under Article 205 of the VAT Directive

1. General remarks

26. Article 205 of the VAT Directive empowers Member States, in the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, to provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.

27. Thus far the Court has had only a few opportunities (3) to make a statement on the scope of this extension to a third party of the obligation to pay VAT which is possible under Article 205 of the VAT Directive.

28. Article 205 of the VAT Directive does not transfer the tax liability to another person, as is the case with Article 196 for example. It provides for a further person who is liable to pay tax, in addition to the taxable person. This payment obligation is joint and several, but is derived from an existing tax liability of another person. It thus effectively establishes the liability of a third party for tax owed by another person. In order to draw a conceptual distinction between this liability and the original tax liability, it will be referred to hereinafter as secondary liability.

29. Article 205 of the VAT Directive permits such secondary liability only in certain situations, including those referred to in Article 193. Article 193 of the VAT Directive concerns the tax liability of the supplier in the case of a purely domestic supply, as in the present case. This 'normal VAT situation' is thus also covered by Article 205 of the VAT Directive. As the Court has ruled, it follows from the clear and unambiguous terms that that provision is applicable in all of the situations referred to therein, including the normal situation of a domestic supply. (4)

30. However, in the exercise of the powers conferred on them by European Union directives, Member States must respect the general principles of law that form part of the European Union legal order, which include, in particular, the principles of legal certainty and proportionality. (5) As regards more particularly the principle of proportionality, the Court has already held that, in accordance with that principle, the Member States must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant European Union legislation. (6) Therefore, whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the public exchequer as effectively as possible, such measures must not go further than is necessary for that purpose. (7)

2. ***Extent of secondary liability under Article 205 of the VAT Directive***

31. Against this background, it is necessary to clarify the actual extent of the secondary liability which is possible under Article 205 of the VAT Directive. The very wording of Article 205 of the VAT Directive suggests that the liability of the third party is limited to ‘die Steuer’ [literally, ‘the tax’]. (8) Recital 44 of the VAT Directive also refers to liability for ‘Entrichtung der Steuer’ [literally, ‘payment of the tax’]. Member States are empowered only to provide that a third party is ‘to be held jointly and severally liable for payment of VAT’. It does not follow, however, that the third party is also jointly and severally liable for further ancillary supplies that may arise (such as interest, charges for late payment, fines and so on).

32. Article 205 of the VAT Directive likewise refers to ‘joint and several’ liability for payment. As the Court has already held, albeit in a different context, it follows from the very nature of joint and several liability that each debtor is liable for the full amount of the debt and the creditor is, in principle, free to claim payment of that *debt* from one or more of the debtors as he chooses. (9) The debt referred to in Article 205 of the VAT Directive is the tax debt.

33. The schematic position also suggests that liability is limited to the tax debt. From a schematic point of view, Article 205 appears in Chapter 1, ‘Obligation to pay’, in Section 1, ‘Persons liable for payment of VAT to the tax authorities’. Those chapters thus relate solely to the tax debt vis-à-vis the tax creditor and not to other ancillary supplies and penalties which may be owed to the tax creditor for other reasons.

34. Similarly, in my view, the spirit and purpose of that provision covers only the actual tax liability. As Bulgaria correctly asserts, the possibility under Article 205 of the VAT Directive for Member States to hold a third party jointly and severally liable for the tax debt is intended to safeguard tax revenue. However, the tax revenue to which the tax creditor is entitled is the tax debt arising from the transaction. Ancillary supplies, on the other hand, are not included in the tax revenue.

35. The Court has already ruled, with regard to a specific ‘liability rule’ in the law on excise duties, that the guarantee provided by a warehousekeeper under EU law to cover the risks inherent in intra-Community movement does not include liability for penalties imposed on a third party. (10)

36. This applies a fortiori here. Default interest owed by the third party does not constitute tax revenue but, in the final analysis, is merely an individual lever (or penalty) in tax law to prompt the defaulting person liable for payment of VAT to make payment in good time. It does not represent tax revenue due to the State. Rather, such interest usually absorbs the benefit gained by the person liable for payment of VAT from late payment compared with a taxable person who pays in good time. Consequently, joint and several liability for such default interest would not make sense from the point of view of safeguarding tax revenue because neither the impulsion effect nor the absorption effect can be achieved. If, on the other hand, the person with secondary liability discharges his secondary liability too late, the same lever – the imposition of default interest – can be applied to him.

37. Thus, the Court has also ruled that Article 205 of the VAT Directive permits joint and several liability for the 'payment of VAT'. However, other obligations, such as the provision of a security, as a kind of accessory obligation, can be based only on Article 207 of the VAT Directive. (11) If the second paragraph of Article 207 of the directive were to allow further (accessory) measures, the view taken by Bulgaria, according to which those accessory measures are (also) covered by Article 205 of the directive, is unconvincing.

38. The possibility of prescribing default interest for late discharge of one's own secondary liability in the second paragraph of Article 207 of the VAT Directive precludes liability for third-party default interest (owed by the person liable for payment of VAT). Otherwise, default interest would be incurred on default interest, which runs counter to the idea of default interest as an (individual) lever and means of absorbing the liquidity advantage. It would also be difficult to reconcile with the principle of proportionality.

39. This interpretation is confirmed by the Court's case-law on Article 205 of the VAT Directive. Thus, whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the public exchequer as effectively as possible, such measures must not go further than is necessary for that purpose. (12) The protection of the public exchequer through the non-payment by the person liable for payment of VAT of the VAT owed is already fully achieved through the liability of a third party for that VAT. Liability for penalties which may be imposed on a third party in connection with those rights therefore goes further than is necessary for the protection of the public exchequer.

40. Accordingly, Article 205 of the VAT Directive allows Member States only to prescribe the liability of a third party for the tax debt owed by the taxable person, but not liability for default interest on the part of the defaulting person liable for payment of VAT. Default interest may, however, be imposed on a defaulting person with secondary liability under the second paragraph of Article 207 of the VAT Directive, although this did not occur in the present case.

3. *Does Article 205 of the VAT Directive preclude an extension of secondary liability to third-party default interest?*

41. Even though Article 205 of the VAT Directive restricts the possibilities for Member States to provide that another person is liable for payment of VAT to VAT, this does not necessarily mean that it precludes further measures by the Member States in their national law of tax procedure.

42. It is not clear from the VAT Directive when and how secondary liability for a third-party tax debt is incurred, unlike when and how tax liability is incurred. The incurrence of secondary liability for a third-party tax debt is therefore determined on the basis of national procedural rules. The same holds for the corresponding lever (default interest, for example), going as far as penalising late payment. The second paragraph of Article 207 of the VAT Directive expressly provides, in connection with persons with secondary liability in accordance with Article 205, that Member States must take the measures necessary to ensure that those persons comply with their payment obligations.

43. As the Court has held in settled case-law, in the absence of harmonisation of EU legislation in the field of sanctions applicable where conditions laid down by arrangements under that legislation are not complied with, Member States remain empowered to choose the sanctions which seem to them to be appropriate. (13)

44. The extension under Article 205 of the VAT Directive of the secondary liability of a third party provided for in the VAT Directive does not, however, fall within the abovementioned

procedural autonomy of the Member States for penalties, as it does not constitute a penalty for misconduct on the part of the person with secondary liability. Rather, it relates directly to the extent of the secondary liability for the misconduct of another person. The extent of secondary liability under EU law is nevertheless governed by EU law in Article 205 of the VAT Directive and limited to the tax debt.

45. Nor is this precluded by the Court's ruling (14) regarding the coverage of risks of intra-Community movement of products subject to excise duty by the guarantee provided by the warehousekeeper of an excise warehouse under EU law. In that case, the Court concluded that Member States may also extend the coverage of risks by means of the guarantee to third-party penalties, going further than EU law. However, that ruling was determined by the particularities of the law on excise duties.

46. Thus, the Court expressly states that the cigarette market particularly lends itself to the development of unlawful trade. (15) In addition, the provisions to be interpreted in that case (Article 13 et seq. of Directive 92/12/EC) were tailored much more strongly than Article 205 of the VAT Directive to the coverage of specific risks to the movement of goods and the relevant offences and irregularities. (16) In addition, there is the special responsibility of warehousekeepers under the law on excise duties for goods in their warehouses, which does not exist in the same way for the recipient of a supply in VAT law.

47. Because EU law limits the extent of secondary liability in VAT law to the tax debt (see above, point 26 et seq.), Article 205 of the VAT Directive precludes an extension of that secondary liability (in this instance to default interest owed by the supplier) by national procedural law. Under the second paragraph of Article 207 of the VAT Directive, Bulgaria is nevertheless free to penalise late payment by the person with secondary liability by imposing default interest as appropriate on the person with secondary liability.

B. Extended liability under Article 205 in conjunction with the first paragraph of Article 273 of the VAT Directive to prevent evasion?

48. In the present case, however, the applicant was held liable with a view to the effective combatting of evasion. Consequently, extended liability that includes default interest owed by the person liable for payment of VAT might be conceivable.

1. *The question when third-party liability is actually possible*

49. In the situation at issue here, which concerns Article 193 of the VAT Directive, it should be noted that the tax liability of the supplier alone is consistent with the notion of VAT as an indirect tax. Any liability of the recipient for the tax debt of the supplier which is prescribed in principle would run counter to this character of VAT. As the Court stresses in settled case-law, suppliers act 'as tax collectors for the State and in the interest of the public exchequer'. (17)

50. If, therefore, the recipient of the supply – like the applicant in this case – has already duly borne the VAT incurred when he paid for the supply, because (see Articles 73 and 78 of the VAT Directive) the VAT was already included in the price, further supplementary liability for that tax on the part of the recipient of the supply requires special justification and substantiation having regard to the principle of proportionality.

51. Accordingly, there must be *special circumstances* for why the recipient of the supply should still be liable for that tax owed by a third party despite having paid the tax through the price. With regard to the fundamental rights of the recipient of the supply (in any event, Article 16 of the Charter would be applicable in this case), Article 205 in conjunction with Article 193 of the VAT

Directive does not therefore, in principle, permit any general or strict liability for the VAT on the part of the recipient of the supply if he has duly paid that VAT to the person liable for payment of VAT (supplier).

52. The Court has thus rightly held that national measures which bring about, de facto, a system of strict joint and several liability go beyond what is necessary to preserve the public exchequer's rights. (18) Imposing responsibility for paying VAT on a person other than the person liable to pay that tax without allowing him to escape liability by providing proof that he had nothing whatsoever to do with the acts of the person liable to pay the tax must, therefore, be considered contrary to the principle of proportionality. (19) It would clearly be disproportionate to hold that person unconditionally liable for the shortfall in tax caused by acts of a third party over which he has no influence whatsoever. (20)

53. The Bulgarian rule in Article 177 of the ZDDS seems to follow the lines of such strict liability. Under that provision, liability arises if the recipient of the supply knew or should have known that the supplier would not pay the tax. If, however, as in the present case, the VAT is paid to the supplier by the recipient of the supply through the price and the supplier duly declares the tax debt, liability would depend solely on the conduct of the supplier, specifically whether the declared tax is paid and in what amount. This cannot normally be influenced by the recipient of the supply.

54. On the other hand, according to the Court's case-law, (21) it is not contrary to European Union law to require the person other than the person liable to pay the tax to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion. Accordingly, the fact that the person other than the person liable to pay the tax acted in good faith, exhibiting all the due diligence of a circumspect trader, that he took every reasonable measure in his power and that his participation in fraud is excluded are important points in deciding whether that person can be obliged to account for the VAT owed. (22)

55. This case-law is consistent with the position adopted in the first paragraph of Article 273 of the VAT Directive, which allows Member States to impose other obligations to ensure the correct collection of VAT and to prevent evasion. Accordingly, extended liability on the part of the recipient of the supply for third-party default interest might be conceivable to prevent evasion under Article 205 in conjunction with the first paragraph of Article 273 of the VAT Directive.

2. Extended liability to prevent evasion under Article 205 in conjunction with the first paragraph of Article 273 of the VAT Directive

56. As was stated above (point 54), according to the Court's case-law, it is not contrary to European Union law to require the person other than the person liable to pay the tax (that is, the person with secondary liability) to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion. (23)

57. However, there is a certain tension between these statements concerning the liability of a third party and the Court's case-law on an undertaking's right of input tax deduction in the context of VAT fraud. According to that case-law, a taxable person who knew or should have known (24) that he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the VAT Directive, be regarded as a participant in that fraud. (25) This *requires* the Member States to refuse the taxable person deduction of VAT (where, as in this case, he is the recipient). (26)

58. If, in accordance with this case-law, the applicant was refused or is still refused input tax deduction, however, there would be no damage at all to the public exchequer that would have to be protected by means of liability under Article 205 of the VAT Directive. Concurrent liability for a third-party tax in the amount of the input tax deduction and refusal of the same input tax deduction by reason of a single instance of fraud would not seem to be compatible with the principle of proportionality, especially since criminal penalties will also normally be imposed by the Member States' national law (and not by the VAT Directive).

59. It appears rather doubtful, in the light of the wording of the VAT Directive and the objective of harmonisation, whether Member States thus have an option to refuse the input tax deduction for the recipient of the supply or whether to hold it jointly and severally liable for the tax. In any event, such an option is not expressly provided for in the VAT Directive. It is even possible that, for reasons of proportionality, joint and several liability would have to take precedence, as an equally appropriate, less stringent means to safeguard tax revenue, over a (potentially multiple) refusal of input tax deduction.

60. However, the Court is not required to resolve this tension here. In the present case, in the absence of VAT fraud, neither refusal of input tax deduction (in accordance with the Court's case-law) nor liability for third-party default interest under Article 205 in conjunction with the first paragraph of Article 273 of the VAT Directive is at issue.

3. ***Non-payment of duly declared tax as tax evasion?***

61. It is clear from the file (27) that the allegation made by the Bulgarian tax authorities against the applicant's supplier is that it failed to pay the declared VAT arising from the transactions with the applicant in good time. However, late payment or failure to pay declared VAT cannot be regarded as VAT evasion or fraud for the purposes of the abovementioned case-law.

62. As the Grand Chamber of the Court has already ruled in *Scialdone*, a distinction must be drawn between mere non-payment and non-declaration of VAT by the person liable for payment of VAT. (28) Failure to pay declared VAT within the time limit prescribed by law does not give the taxable person a benefit since the tax is still payable. It follows that the Court's interpretation of Article 325(1) TFEU in relation to cases of VAT fraud is not applicable to the case of failure to pay declared VAT.

63. The same also applies to the rest of the Court's case-law on fraud since, as the Court (29) continues, such failures to pay declared VAT do not present the same degree of seriousness as VAT fraud. As soon as the taxable person has duly fulfilled his declaration obligations, the authorities have the necessary data to establish the amount of VAT chargeable and whether there is a failure to pay it.

64. Contrary to the view evidently taken by the Commission, the fact that a third party knows about the non-payment of the tax debt by the person liable for payment of VAT is not sufficient, as the Grand Chamber made clear most recently in *Scialdone*, (30) to be able to consider that the third party knew or should have known that through its supply it was involved in VAT fraud or evasion. Rather, it is necessary that the third party knew or should have known that the transactions were not duly declared in order to defraud the tax authorities. Non-payment of *duly declared tax* cannot be regarded as (fraudulent) deception of the tax authorities.

65. The situation would possibly be different if the applicant had intentionally used the supplier as an intermediate company without assets, which, as such, would not be able to pay the declared VAT. That is not apparent from the request for a preliminary ruling, however. Rather, the contrary

is suggested by the fact that the applicant paid the supplier, with the result that it had been able, in principle, to pay its declared VAT liability. It is ultimately for the referring court to make this factual clarification or finding.

66. According to the description of the circumstances by the referring court, there is no VAT fraud in this case. It is therefore immaterial that the applicant knew or should have known that the correctly declared VAT was not paid in good time or in full. Liability for default interest owed by a third party under Article 205 in conjunction with the first paragraph of Article 273 of the VAT Directive is thus also ruled out.

VI. Conclusion

67. I therefore propose that the Court answer the question asked by the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) as follows:

Article 205 of Directive 2006/112/EC on the common system of value added tax is to be interpreted as precluding the inclusion of default interest which is owed by the person liable for payment of VAT by reason of late payment of VAT in the secondary liability of a third party.

1 Original language: German.

2 OJ 2006 L 347, p. 1, in the version applicable in the period at issue.

3 Only the following can be mentioned: judgments of 21 December 2011, *Vlaamse Oliemaatschappij* (C?499/10, EU:C:2011:871, paragraph 19 et seq.), and of 11 May 2006, *Federation of Technological Industries and Others* (C?384/04, EU:C:2006:309, paragraph 25 et seq.), both relating to the predecessor provision, the content of which is identical. Mention can also be made of the judgment of 26 March 2015, *Macikowski* (C?499/13, EU:C:2015:201), which, however, resolved the problem of liability at issue there without an interpretation of Article 205 of the VAT Directive (but see my Opinion in that case (C?499/13, EU:C:2014:2351, point 58 et seq.).

4 See also, with regard to the predecessor provision in Article 21(3) of the Sixth Directive, judgment of 11 May 2006, *Federation of Technological Industries and Others* (C?384/04, EU:C:2006:309, paragraph 26).

5 Judgments of 21 December 2011, *Vlaamse Oliemaatschappij* (C?499/10, EU:C:2011:871, paragraph 20); of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 18); and of 11 May 2006, *Federation of Technological Industries and Others* (C?384/04, EU:C:2006:309, paragraph 29).

6 Judgments of 21 December 2011, *Vlaamse Oliemaatschappij* (C?499/10, EU:C:2011:871, paragraph 21); of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 19); and of 27 September 2007, *Teleos and Others* (C?409/04, EU:C:2007:548, paragraph 52).

7 Judgments of 21 December 2011, *Vlaamse Oliemaatschappij* (C?499/10, EU:C:2011:871, paragraph 22); of 7 December 2010, *R* (C?285/09, EU:C:2010:742, paragraph 45); of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 20); and of 27 September 2007, *Teleos and Others* (C?409/04, EU:C:2007:548, paragraph 53); similarly, judgment of 11 May 2006, *Federation of Technological Industries and Others* (C?384/04, EU:C:2006:309, paragraph 30).

8 The English version of Article 205 of the VAT Directive refers to 'payment of VAT' and the French version to 'acquitter la TVA'.

9 Judgments of 22 November 2017, *Aebtri* (C?224/16, EU:C:2017:880, paragraph 80), and of 18 May 2017, *Latvijas Dzelzcešs* (C?154/16, EU:C:2017:392, paragraph 85).

10 Judgment of 2 June 2016, *Kapnoviomichania Karelia* (C?81/15, EU:C:2016:398, paragraph 38 et seq.); see also Opinion of Advocate General Bot in *Karelia* (C?81/15, EU:C:2016:66, point 37).

11 Judgment of 11 May 2006, *Federation of Technological Industries and Others* (C?384/04, EU:C:2006:309, paragraph 43 et seq.), again concerning the predecessor provision.

12 Judgments of 21 December 2011, *Vlaamse Oliemaatschappij* (C?499/10, EU:C:2011:871, paragraph 22), and of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 20); similarly, judgment of 11 May 2006, *Federation of Technological Industries and Others* (C?384/04, EU:C:2006:309, paragraph 30).

13 Judgment of 8 May 2019, *EN.SA.* (C?712/17, EU:C:2019:374, paragraph 38); of 26 April 2017, *Farkas* (C?564/15, EU:C:2017:302, paragraph 59); see, to that effect and inter alia, judgments of 6 February 2014, *Fatorie* (C?424/12, EU:C:2014:50, paragraph 50), and of 7 December 2000, *de Andrade* (C?213/99, EU:C:2000:678, paragraph 20).

14 Judgment of 2 June 2016, *Kapnoviomichania Karelia* (C?81/15, EU:C:2016:398).

15 Judgment of 2 June 2016, *Kapnoviomichania Karelia* (C?81/15, EU:C:2016:398, paragraph 37).

16 See judgment of 2 June 2016, *Kapnoviomichania Karelia* (C?81/15, EU:C:2016:398, paragraph 9).

17 Judgments of 15 October 2020, *E.* (VAT – Reduction of the taxable amount (C?335/19, EU:C:2020:829, paragraph 31); of 8 May 2019, *A-PACK CZ* (C?127/18, EU:C:2019:377, paragraph 22); judgment of 23 November 2017, *Di Maura* (C?246/16, EU:C:2017:887, paragraph 23); of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 21); and of 20 October 1993, *Balocchi* (C?10/92, EU:C:1993:846, paragraph 25).

18 Judgments of 21 June 2012, *Mahagében* (C?80/11 and C?142/11, EU:C:2012:373, paragraph 48); of 21 December 2011, *Vlaamse Oliemaatschappij* (C?499/10, EU:C:2011:871, paragraph 24); and of 11 May 2006, *Federation of Technological Industries and Others* (C?384/04, EU:C:2006:309, paragraph 32); and Opinion of Advocate General Poiares Maduro in *Federation of Technological Industries and Others* (C?384/04, EU:C:2005:745, point 27).

19 As is expressly held in the judgment of 21 December 2011, *Vlaamse Oliemaatschappij* (C?499/10, EU:C:2011:871, paragraph 24).

20 Judgments of 21 December 2011, *Vlaamse Oliemaatschappij* (C?499/10, EU:C:2011:871, paragraph 24), and of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 23).

21 Judgments of 21 December 2011, *Vlaamse Oliemaatschappij* (C?499/10, EU:C:2011:871, paragraph 25); of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 24); of 27 September 2007, *Teleos and Others* (C?409/04, EU:C:2007:548, paragraph 65); and of 11 May 2006, *Federation of Technological Industries and Others* (C?384/04, EU:C:2006:309, paragraph 33).

22 See judgment of 21 December 2011, *Vlaamse Oliemaatschappij* (C?499/10, EU:C:2011:871, paragraph 26); similarly, judgments of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 25), and of 27 September 2007, *Teleos and Others* (C?409/04, EU:C:2007:548, paragraph 66).

23 Judgments of 21 December 2011, *Vlaamse Oliemaatschappij* (C?499/10, EU:C:2011:871, paragraph 25); of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105, paragraph 24); of 27 September 2007, *Teleos and Others* (C?409/04, EU:C:2007:548, paragraph 65); and of 11 May 2006, *Federation of Technological Industries and Others* (C?384/04, EU:C:2006:309, paragraph 33).

24 In some earlier decisions the Court still used the wording ‘could not know’ (see, for example, judgment of 6 July 2006, *Kittel and Recolta Recycling* (C?439/04 and C?440/04, EU:C:2006:446, paragraph 60)). However, this excessively broad wording, stemming solely from the question referred, now seems to have been rightly abandoned.

25 Judgments of 20 June 2018, *Enteco Baltic* (C?108/17, EU:C:2018:473, paragraph 94); of 22 October 2015, *PPUH Stehcemp* (C?277/14, EU:C:2015:719, paragraph 48); of 13 February 2014, *Maks Pen* (C?18/13, EU:C:2014:69, paragraph 27); of 6 September 2012, *Mecsek-Gabona* (C?273/11, EU:C:2012:547, paragraph 54); of 6 December 2012, *Bonik* (C?285/11, EU:C:2012:774, paragraph 39); and of 6 July 2006, *Kittel and Recolta Recycling* (C?439/04 and C?440/04, EU:C:2006:446, paragraph 56).

26 See judgments of 22 October 2015, *PPUH Stehcemp* (C?277/14, EU:C:2015:719, paragraph 47); of 18 December 2014, *Schoenimport ‘Italmoda’ Mariano Previti* (C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraph 62); of 13 March 2014, *FIRIN* (C?107/13, EU:C:2014:151, paragraph 40); of 13 February 2014, *Maks Pen* (C?18/13, EU:C:2014:69, paragraph 26); of 6 December 2012, *Bonik* (C?285/11, EU:C:2012:774, paragraph 37); of 21 June 2012, *Mahagében* (C?80/11 and C?142/11, EU:C:2012:373, paragraph 42); and of 6 July 2006, *Kittel and Recolta Recycling* (C?439/04 and C?440/04, EU:C:2006:446, paragraphs 59 and 61).

27 See paragraph 5 of the French version of the request for a preliminary ruling (page 4 of the original) and paragraph 3 of the German summary of the request for a preliminary ruling.

28 Judgment of 2 May 2018, *Scialdone* (C?574/15, EU:C:2018:295, paragraphs 39 and 40).

29 Judgment of 2 May 2018, *Scialdone* (C?574/15, EU:C:2018:295, paragraphs 41 and 42).

30 Judgment of 2 May 2018, *Scialdone* (C?574/15, EU:C:2018:295).